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RAJA THANGIAH

v.

BALDEV SINGH BHAR

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HIGH COURT MALAYA, KUALA LUMPUR

NIK HASHIM J

[CIVIL APPEAL NO: R3-12-287-97]

22 JULY 2001

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CIVIL PROCEDURE: *Transfer of proceedings - Sessions Court to another Sessions Court - Question of fair and convenient forum - Factors to be taken into consideration - Where cause of action arose, residence and financial capacity/incapacity of parties involved considered - Breach of agreement by defendant - Whether there was cause of complaint - Whether defendant debtor must seek plaintiff creditor for payment of money due - Burden of proof - Whether successfully discharged by defendant - Whether fit and proper case to be transferred - Section 23 of the Courts of Judicature Act 1964 - Whether applicable - Order 47 r. 1 of the Subordinate Courts Rules 1980, para 3(2) of the Third Schedule of the Subordinate Courts Act 1948*

*d**e*

The plaintiff had filed a case to recover some money from the defendant *vide* the Sessions Court, Kuala Lumpur, arising from a consent judgment recorded earlier in the Sessions Court, Butterworth for a claim in an accident case involving the plaintiff. The defendant subsequently applied to have the case (for the recovery of money) transferred to the Butterworth Sessions Court, and the application was granted by the Sessions Court judge, Kuala Lumpur.

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Hence, this appeal by the plaintiff against the judge's decision.

Held:*g*

[1] The relevant provisions governing the transfer of proceedings from one Sessions Court to another are provided under O. 47 r. 1 of the Subordinate Courts Rules 1980 (the "SCR") and para. 3(2) of the Third Schedule of the Subordinate Courts Act 1948 (the "SCA"). Section 23 of the Courts of Judicature Act 1964 that was relied on by the defendant, has no relevance in this case, which is a Sessions Court case. That section applies only to High Court.

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[2] In assessing the convenient or fair forum of the trial, the court must be satisfied that the proceedings that sought to be transferred, could be more conveniently or fairly tried in the other court. Matters such as where the cause of action arose, the residence and the hardship of the parties involved are important, and therefore will be taken into consideration.

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- [3] It was averred in the plaintiff's affidavit that his claim against the defendant was based on a contract, in which, the defendant was to pay him the judgment sum wherever he was. Since the plaintiff resides in Kuala Lumpur, it was submitted that the defendant had breached the agreement in failing to pay him in Kuala Lumpur. This averment was not contradicted by the defendant, therefore, on the authorities, are deemed to be admitted. Thus, it is viewed that the cause of action in this instance arose in Kuala Lumpur. Further, the failure of the defendant to pay the plaintiff in Kuala Lumpur, constituted an act on the part of the defendant, which gave the plaintiff cause of complaint. a
- [4] The defendant had clearly admitted that he was the debtor and the plaintiff, the creditor. The defendant must therefore seek the plaintiff for payment of the money due. Thus, the institution of the case in Kuala Lumpur Sessions Court was rightly made by the plaintiff. b
- [5] The burden is on the defendant applicant to satisfy the court why the Butterworth Sessions Court is a more convenient or fair forum for the trial of the case. In this instance, the defendant has failed to discharge the burden. c
- [6] On the contrary, the plaintiff has shown why the case could be more conveniently or fairly tried in the Kuala Lumpur Sessions Court. The plaintiff is physically handicapped, unemployed and living in charity, whilst the case is handled by his solicitors on a non-fee basis. The inconvenience of the defendant, if any, cannot be accepted as basis for the transfer, as his inconvenience far outweighs in favour of the plaintiff's inconveniences. Thus, in the interests of justice, this was not a fit and proper case to be transferred to the Butterworth Sessions Court . d
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[Plaintiff's appeal allowed.]

Case(s) referred to:

Distillers Co (Bio-Chemicals) Ltd v. Thompson [1971] 1 All ER 694 PC (**refd**) g
Ng Hee Thoong & Anor v. Public Bank Bhd [1995] 1 CLJ 609 (**fol**)
Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor [1988] 2 CLJ 238;
[1988] 2 CLJ (Rep) 82 (**fol**)

Legislation referred to:

Courts of Judicature Act 1964, s. 23 h
Subordinate Courts Act 1948, para 3(2), Third Schedule
Subordinate Courts Rules 1980, O. 47 r. 1

Other source(s) referred to:

Sarkar's The Law of Civil Procedure, vol 1, p 130 i

- a* For the plaintiff - S Kanawagi; M/s Khana & Co
For the defendant - Charanjit Singh; M/s Ong & Manecksha

Reported by Raja Vishnu Sivarajah

JUDGMENT

- b* **Nik Hashim J:**

The Facts

- c* This is an appeal by the plaintiff against the decision of the Sessions Court Judge given on 23 October 1997 in granting the defendant's application for the transfer of proceedings in respect of Kuala Lumpur Summons No. 52-5634-97 (the case) from the Sessions Court Kuala Lumpur to the Sessions Court Butterworth.

- d* Briefly, the facts are that on 11 February 1992 the plaintiff while riding a motorcycle met with an accident in Seberang Perai and lost his right leg below the knee. Meanwhile the plaintiff engaged the services of the defendant as an advocate and solicitor to make a claim against the tortfeasors *vide* the Sessions Court Butterworth Summons No. 53-46-92 (the accident case). On 18 October 1994, a consent judgment was recorded against the tortfeasors to pay the plaintiff a sum of RM100,000 for damages and an additional RM10,000 as costs in the said Sessions Court. The tortfeasors insurers Messrs Pacific & Oriental Insurance Co Sdn Bhd thereafter sent the money by a crossed cheque to the plaintiff through the defendant the sum of RM100,000. The plaintiff averred that the defendant had forged his signature and banked the cheque into his clients' account. The defendant denied the averment. He refused to disburse the same to the plaintiff as he claimed that there was a dispute between them over the amount to be paid to the plaintiff by the defendant after deduction of fees and other expenses from the damages of RM100,000. Meanwhile the plaintiff shifted to Kuala Lumpur and has been staying in Brickfields since early 1995. The plaintiff filed the case against the defendant in the Sessions Court Kuala Lumpur to recover the sum of RM100,000 from the defendant.

- g* The defendant was an advocate and solicitor practising in Penang. The defendant applied to have the case transferred to the Butterworth Sessions Court, and the application was allowed by the Sessions Court Judge, Kuala Lumpur. Hence the appeal by the plaintiff.
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The application was supported by the defendant's affidavit which stated as follows:

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4. The plaintiff's action against the Defendant arose from a Sessions Court action in Butterworth *vide* Summons No. 53-46-92. As such the cause of action arose in Butterworth and not in Kuala Lumpur. Under Section 23 of the Court of Judicature Act 1964 the Defendant can transfer this matter to the Butterworth Sessions Court since the cause of the action arose in Butterworth.

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5. Furthermore, the Defendant here resides in the State of Penang and has acted for and on behalf of the Plaintiff in a personal injury claim in Penang.

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6. In the event, this matter is set down for trial the Defendant will have to bring all his several witnesses from Penang. He will be compelled to incur unjustified charges and expenses though he is merely defending this action.

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7. The fact that the Defendant is a Debtor and, as against the Plaintiff may be in a better financial standing to pay the witnesses charges for the hearing in Kuala Lumpur should not be a point to be taken into consideration.

8. The fact is that it is up to the Plaintiff to prosecute his case at the proper jurisdiction, even if this subjects to expenses.

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9. In view of the above and the criteria laid down in Section 23(a), (b) and (c) of the Courts of Judicature Act 1964 is satisfied. The Defendant prays for Order in Term.

The plaintiff averred in his affidavit by saying that:

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12. I am advised and verily believe that my claim against the Defendant is based on professional retainer agreement between the Defendant and myself and by which agreement the Defendant expressly or impliedly agreed to pay me the judgment sum received by him wherever I was and since I am in Kuala Lumpur the Defendant has breached this professional retainer agreement, in failing to pay me in Kuala Lumpur. I say that my cause of action arises in Kuala Lumpur.

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13. I am advised and verily believe that since I am living in Kuala Lumpur, this Honourable Court has jurisdiction to try in this court.

14. There are other reasons why this case should be heard in Kuala Lumpur.

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15. I am an handicapped person with one leg and unemployed and living on charity. I cannot afford to go to Penang to redress the wrong done to me whereas the Defendant is a millionaire lawyer who has cheated me.

16. Further my present Solicitors are doing this case free of charge and if the case is transferred to Penang, I would be unable to meet my Solicitor's cost of going to Penang.

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17. I say that the Defendant who is an Advocate & Solicitor of long standing is trying to make things difficult for me.

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a Contentions Of The Parties

b The defendant submitted that since the accident took place in Seberang Perai and the accident case was conducted by the Butterworth Sessions Court, the proper forum to try the case was in the Butterworth Sessions Court. Further, since the defendant was staying in Penang, the case should be tried in Penang and in this case in Butterworth and he relied upon s. 23 of the Courts of Judicature Act 1964 (the Act) in support.

c The plaintiff, on the other hand, argued that the case was not the same case as the accident case but was a case based on retainer/contract between the plaintiff as client and the defendant as solicitor. The plaintiff's case was for recovery of money arising from a consent judgment in the accident case.

d After hearing the submissions of both learned counsel, I, on 20 August 1998, allowed the appeal with costs and set aside the order of the Sessions Court and ordered the case to be tried in Sessions Court, Kuala Lumpur.

d Findings Of The Court

e In my view, the relevant provisions governing the transfer of proceedings from one Sessions Court to another are provided under O. 47 r. 1 of the Subordinate Courts Rules 1980 (SCR) and para. 3(2) of the Third Schedule of the Subordinate Courts Act 1948 (the SCA).

Order 47 r. 1 of the SCR states:

f Where the Judge of any Court is satisfied that any proceedings in that court can be more **conveniently** or **fairly** tried in some other Court he may order the proceedings to be transferred to the other Court. (emphasis added).

Whereas para. 3(2) of the Third Schedule of the SCA which provides additional powers to Sessions Courts and Magistrates' Courts, states:

g Power, on application or of its own motion, to transfer any proceedings to another court of co-ordinate jurisdiction.

It is to be noted that s. 23 of the Act referred to by the defendant as the criteria for the application has no relevance at all to the present case which is a Sessions Court case. That section applies only to the High Court.

h Thus, in considering an application for transfer any proceedings to another court of co-ordinate jurisdiction, the court must first of all be satisfied whether the proceedings that sought to be transferred could be more conveniently or fairly tried in the other court. In assessing the convenient or fair forum of the trial, matters such as where the cause of action arose, the defendant's residence and the hardship of the parties are important and therefore must be taken into consideration.

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The plaintiff's present case was for the recovery of money arising from a consent judgment in the accident case. In reply to the defendant's supporting affidavit, the plaintiff averred at para. 12 of his affidavit that his claim against the defendant was based on contract in which the defendant was to pay him the judgment sum wherever he was and since he was in Kuala Lumpur the defendant had breached the agreement in failing to pay him in Kuala Lumpur. The defendant, however, did not reply to this material averment.

It is trite law that where a case is to be decided on a contest of affidavits, the rule is that material allegations which are not contradicted are deemed to be admitted (see *Overseas Investment Pte Ltd v. Anthony William O'Brien & Anor* [1988] 2 CLJ 238; *Ng Hee Thoong & Anor v. Public Bank Bhd* [1995] 1 CLJ 609 CA).

Therefore, since the plaintiff's positive averment was not rebutted, the court took the view that the cause of action in the present case arose in Kuala Lumpur as the breach of the agreement by the defendant to pay the plaintiff in Kuala Lumpur constituted an act on the part of the defendant which gave the plaintiff cause of complaint (*Distillers Co (Bio-Chemicals) Ltd v. Thompson* [1971] 1 All ER 694 PC).

Besides, the defendant admitted in his affidavit that he was a debtor and the plaintiff as the creditor (see para. 7 of his affidavit). This is clearly an admission. The defendant being the debtor must therefore seek the plaintiff creditor for payment of the money due (see *Sarkar's The Law of Civil Procedure* vol. 1 p. 130 – "Debtor must seek his creditor"). The defendant who had received the judgment sum due to the plaintiff as a stakeholder is duty bound to pay out the money to the plaintiff. Thus, the institution of the case in Kuala Lumpur Sessions Court was rightly made by the plaintiff.

It is pertinent to note that the burden is on the defendant applicant to satisfy the court why the Butterworth Sessions Court is a more convenient or fair forum for the trial of the case. Unfortunately in this case, the defendant failed to discharge that burden.

On the contrary, the plaintiff had shown to the court why the case could be more conveniently or fairly tried in the Kuala Lumpur Sessions Court. He is physically handicapped in that he has lost one of his legs below the knee and unemployed and living on charity. Further, the case is handled by his solicitors on non-fee basis. And these averments were not rebutted by the defendant. Surely, it would cause a lot of inconveniences and physical as well as monetary hardship to the plaintiff if the case is transferred to Butterworth Sessions Court. It would be most unreasonable to require the plaintiff, one-legged man, to travel all the way to Butterworth to recover his money. The

- a* inconvenience of the defendant, if any, cannot be accepted as the basis for the transfer as his inconvenience far outweighs in favour of the plaintiff's inconveniences. In my view, the Kuala Lumpur Sessions Court is a proper and more convenient or fair forum for the trial of the case.

b **Conclusion**

Thus, in the interest of justice, I ruled that this was not a fit and proper case to be transferred to the Butterworth Sessions Court.

- c* There was simply no good basis for the transfer. In the event, I allowed the appeal and made the orders accordingly.
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